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IN THE

Supreme Court of the United States

OCTOBER TERM 1948

No. 676

FRANK BAILEY, *et al.*,

Intervenors-Petitioners,

—v.—

EDWARD O. PROCTOR, *et al.*,

Receivers.

ON APPLICATION OF RECEIVERS AND ATTORNEYS FOR ALLOWANCES

PETITION FOR CERTIORARI

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GEORGE TROSK,
MILTON S. GOULD,
HENRY M. LEEN,
of Counsel.

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PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIRST CIRCUIT, AND SUPPORTING BRIEF

To the Honorable the Chief Justice and the Associate Justices of the Supreme Court of the United States:

Petitioners, by Jesse Climenko, their attorney, pray that a Writ of Certiorari issue to review an order of the United States Court of Appeals for the First Circuit rendered January 17, 1949. The order referred to affirms an order of the United States District Court, District of Massachusetts, which (1) grants the receivers of Aldred Investment Trust a final allowance of $170,000 in addition to $75,000 theretofore awarded them, and (2) grants Putnam, Bell, Dutch & Santry, Esqs. $18,000 for legal services rendered to Aldred prior to receivership, and to the attorney for the receivers during the receivership,

in connection with the defense of an action brought against Aldred by John J. Murphy.

Jurisdiction

The basis of jurisdiction is Section 240 of the Judicial Code.

Summary Statement of Matters Involved

Aldred Investment Trust (hereinafter referred to as "the Trust") is a Massachusetts Trust organized in 1927.

Prior to its liquidation, hereinafter referred to, the Trust had outstanding 171,500 shares and $5,900,000 of 4-1/2% debentures due in 1967.

In May 1944, the Securities and Exchange Commission commenced a proceeding for the appointment of a receiver of the Trust and to enjoin Hanlon, then President of the Trust, and his associates from continuing to serve as officers and trustees, on the ground that they had been guilty of gross misconduct and gross abuse of trust.

After trial, the learned District Court found Hanlon and his associates guilty as alleged in the complaint, enjoined them from continuing to act, and appointed Edward O. Proctor, Esq., an attorney at law, and Edward F. Goode, Esq., an employee of a stock exchange house, receivers of the Trust (58 F. Supp. 724; aff'd 151 F. 2d 254; cert. denied 326 U. S. 795).

While the Trust was in receivership, petitioners, by bona fide purchase, acquired approximately 65% of the issued and outstanding stock of the Trust and $79,000 face amount of its debentures. Subsequently, by order of the Court, petitioners were permitted to intervene in the proceeding.

The assets of the Trust in receivership consisted exclusively of stocks, bonds and cash. The securities were sold

by the receivers pursuant to Court order. The holders of debentures were paid the full face amount of their debentures, with accrued interest. Shareholders were given the option to turn in their shares and receive the liquidation value thereof, or to continue as shareholders of the Trust. All those who did not elect to remain with the Trust have been paid the full liquidating value of their shares; the others remain the only shareholders, and the assets representing the liquidating value of their shares constitute the entire corpus of the Trust.

The receivers were appointed Jan. 19, 1945. By September, 1946, all the securities in the portfolio had been disposed of, with two minor exceptions (R. 12). From then on the receivers had no substantial duties to perform except to hold the Government bonds in which the proceeds of the sales were invested, and to distribute as directed by the Court. Thus the active period of the receivership did not last longer than twenty months.

In the course of the receivership, the receivers were allowed, *ex parte*, $75,000 on account of their compensation By the order now sought to be reviewed, they have been allowed an additional $170,000, bringing their total compensation to $245,000 (R. 21-22).

The Trust, to protect its interest in Eastern Racing Association, Inc., of which it was controlling stockholder, had Mr. Goode, one of the receivers, elected Treasurer of the Racing Association. He acted as such for about thirteen months during the receivership, for which he was separately paid at the rate of $25,000 per annum by the Racing Association (R. 22).

By the order now sought to be reviewed, the law firm of Putnam, Bell, Dutch & Santry, Esqs. (hereinafter referred to as "the Putnam firm") have been allowed $18,000 for services prior to and during the receivership in the defense

of an action brought against the Trust by John J. Murphy.

In the course of the receivership, the District Judge made other allowances to attorneys aggregating $119,000.

Thus, in a receivership which did not involve the carrying on of a business, but only the sale of a portfolio of securities, the reinvestment of the proceeds in Government securities, and distribution, the learned District Judge has made allowances of $245,000 to the receivers and $137,000 to others, a total of $382,000. These, if permitted to stand in full, with the other expenses of administration, would bring the administrative costs of the receivership to approximately $450,000.

The Questions Presented

1. May allowances of $263,000 be made upon a statement of services so meager and so indefinite that the District Judge must have based them, as he indicated he would, on matters not shown by the record; or must allowances be based, as all other decisions in judicial proceedings must be based, on facts appearing in the record so that an Appellate Court may make an intelligent review?

2. The statement of services furnished by the receivers—vague and incomplete as it is—lumps services for the receivership and services not for the receivership, and the time expended is given only in gross for all the services combined. May such a statement be accepted as a basis for fixing allowances to receivers?

3. Treating Mr. Proctor's statement of the time spent—1217 hours—as if all of it were devoted by him to the receivership (although his own statement recites that a substantial part was not), the allowance to him of $122,500 is

at the rate of more than $90 per hour. May such an allowance stand?

4. To protect the Trust's interest in Eastern Racing Association, Inc., of which the Trust was the controlling stockholder, the receivers had Mr. Goode, one of the receivers, made Treasurer of the Racing Association, and the Racing Association paid him, as its Treasurer, at the rate of $25,000 per annum for thirteen months during the receivership. Should not this income have been credited against any commissions payable to him as receiver?

5. There is nothing in the record to show on what basis receiver Goode has been compensated. All we know is that he was an "employee" of a stock exchange house up to the time of his appointment; that the receivership did not take his full time; and that during the same period he received upwards of $25,000 from Eastern Racing Association. Is an allowance of $122,500 to Mr. Goode permissible in these circumstances?

6. The Putnam firm has been awarded $18,000 for legal services. All there is in the record on the subject is the statement of Mr. Proctor, one of the receivers, that prior to receivership the Putnam firm represented the Trust in the *Murphy* case; that that case took five days for trial; that during the receivership a member of the firm assisted Mr. Proctor in preparing findings and a brief in that case, and that the firm did "a considerable amount of work." May an allowance of $18,000 so be granted on such a showing?

The Reasons Relied on for the Allowance of the Writ

1. It is submitted that this Court should disapprove the making of allowances of $263,000 on a record which contains no factual basis for them and from which the justification for the amounts awarded could not be reviewed intelligently by an Appellate Court.

2. Allowances in substantial amounts should not be made on a statement of services (even if, unlike the one here, it were clear and full) which bulks services performed for the receivership with substantial services which were not, and in which the time spent is given only for all the services combined.

3. The allowances are shockingly excessive.

Mr. Proctor has been allowed compensation at a rate in excess of $90 per hour on his own statement of the time spent, which includes time spent on matters not compensible by the receivership estate.

The rate of compensation to Mr. Goode for services to the receivership cannot be computed because (a) he has been allowed for receivership as well as non-receivership services, and (b) the time spent is not shown either for all the services or for the portion thereof performed for the receivership.

The Putnam firm has been awarded $18,000 upon only the vaguest statement of the services performed by them.

4. Since Mr. Goode was made Treasurer of Eastern Racing Association by virtue of the Trust's stock-control of the Racing Association, and in order to protect receivership property, the compensation he received from Eastern Racing Association—$25,000 per year—should have been credited against the commissions earned by him as receiver.

5. It was reversible error for the learned District Judge to refuse to permit petitioners to introduce proof concerning the services performed by the receivers, the time spent by them thereon, and other circumstances which would bear upon what a reasonable allowance would be.

6. Whether or not the allowances here made shall stand, important as the determination of this question is to the litigants in this proceeding, raises questions of great importance in the administration of receiverships generally; and in the interest of settling the principles involved for the guidance of the bench and the bar throughout the nation, it is respectfully submitted that a Writ of Certiorari should issue.

POINT I

Allowances aggregating two hundred and sixty-three thousand dollars have been made on a record so meager and so vague that the amount can be justified, if at all, only on the assumption that the learned District Judge based the awards on information not appearing in the Record.

If allowances so made may stand, the safeguards of hearing on notice and right to review on appeal become worthless.

Allowances to equity receivers are in the sound discretion of the Court (*Central Trust Co.* v. *Wabash, St. L. & P. Ry. Co.*, 32 Fed. 187, 188 (C. C. E. D. Mo., 1887)).

> "in the sense that there are no fixed rules to determine the proper allowance, and is not discretionary in the sense that the courts are at liberty to give anything more than a fair and reasonable compensation."

Equally well established is the doctrine that orders of the District Court granting allowances are appealable: where District Courts have allowed more than "fair and reasonable compensation", the Appellate Courts have not been hesitant to reduce the allowances (*City of New Orleans* v. *Malone,* 12 F. 2d 17 (C. C. A. 5, 1926); *Walton N. Moore Dry Goods Company* v. *Lieurance,* 38 F. 2d 186 (C. C. A. 9, 1930); *Newton* v. *Consolidated Gas Company,* 259 U. S. 101).

But if the right to be heard, and to a review on appeal from an allowance deemed excessive, is to be something more than an empty phrase, if it is to be any kind of protection against error, the basis and justification for allowances must be found in facts appearing in the record; they may not be sustained on the theory that, although unsupported by the record, there may have been an adequate basis in facts known to the Court below, but not in the record. This is so inherent in the very nature of a review on appeal under our jurisprudence, and so patently essential to the administration of justice as we understand it, that any further discussion of the point would seem supererogatory.

Not only is the record insufficient to support the substantial allowances made here, but the learned District Judge made it quite clear that, in fixing the amount of the allowances, he did not feel bound to limit himself to the record facts, and felt free to base his award on information acquired by him from sources outside the record (R. 35, 47).

Turning to the proof which is in the record, we find only general statements that there were "conferences", "negotiation" and "study"; that matters were "discussed", "explored" and "investigated", and that there was "much paper work"; also that securities in the portfolio were sold

from time to time pursuant to Court order (R. 11), and that there were "other matters", such as the making of reports, correspondence and the consideration of "numerous legal problems" (R. 18). All these services are referred to in the most general terms; in no instance do the receivers give any details or state how much time was spent.

Mr. Proctor, who acted as attorney for the estate in receivership as well as receiver, has given a Statement of the legal services performed by him, all of which is included in the services for which he has asked and been allowed compensation (R. 16-17).

Mr. Proctor's Statement of legal services shows that he appeared in the District Court on ten occasions in support of, or in opposition to, motions; that he appeared in the Court of Appeals on two days, and collaborated in the writing of briefs on these two matters.

Of the ten appearances in the District Court, Mr. Proctor admits that two related to motions concerning which the receivers were "neutral" (R. 17); some of the others likewise related to matters in which the receivers should have remained neutral (R. 16-17).

The only other legal service performed by Mr. Proctor was the preparation, "with Mr. Bancroft's assistance", of the findings in *Murphy* v. *Hanlon* (R. 15). Mr. Bancroft was an associate of the Putnam firm (R. 14), who have been allowed $18,000 for their services in the *Murphy* case. Mr. Proctor spent "practically [a] full day" arguing the *Murphy* case in the Superior Court; he collaborated with Mr. Bancroft in preparing a brief, and he argued the case before the Full Court (R. 15).

As far as Mr. Goode is concerned, the record furnishes no evidence of the basis upon which the allowance to him was determined. The services performed by Mr. Goode are stated in the most general terms (*infra*, pp. 13-14), and for these he has been allowed $122,500 in addition to upwards

of $25,000 which he received during the period of the receivership for acting as Treasurer of Eastern Racing Association—an office to which he was elected by virtue of the stock control of the Association by the Trust, and for the purpose of protecting a Trust asset.

We know only that up to the time of his appointment as receiver, Mr. Goode was an "employee" of a stock exchange house (R. 19); that from at least September, 1946, when only Eastern Gas and Fuel stock remained in the portfolio, "the affairs of the Trust were not a full time job" and required "on the average of about one-half of each working day" (R. 20).

Insofar as the allowance of the $18,000 to the Putnam firm is concerned, there is no proof in the record as to the nature and extent of their services, beyond a reference to their having been counsel to the Trust in the *Murphy* case, in which five days were occupied in trial and taking of evidence (who tried the case and who took the evidence is not stated), and the preparation by one of the firm's associates of findings and a brief (R. 15). The record contains but one other reference to the services performed by the Putnam firm: the oral statement of Mr. Proctor that the Putnam firm "did a considerable amount of work" before the receivership and that there were "conferences" between Mr. Proctor and one of the members of the Putnam firm (R. 34).

The defect in the proof of the services performed by the Putnam firm affects the allowance to Mr. Proctor, because his allowance includes services in the same case and the need and value of the services performed by each cannot be intelligently estimated without knowing what was done by the other.

Thus we have allowances aggregating $263,000 upon a record which is palpably insufficient to justify such substan-

tial amounts. The deficiency, if cured at all in the mind of the District Court, must have been cured by his reliance upon information not in the record, upon which he said he would rely (R. 35, 47).

If allowances may be made and sustained upon matters not in the record, the right to hearing on notice before they are made, and to a review on appeal after they are made, becomes an illusion.

It is submitted that this Court should disapprove the making of substantial allowances on any basis other than facts appearing in the record from which the justification for the amount awarded may be intelligently reviewed by an Appellate Court; that this record is, as a matter of law, insufficient to justify the allowances which have been made, and the order making them should therefore be reversed.

POINT II

The statement of services furnished by the receivers, for which they have received their allowances, lumps receivership services and substantial services not compensable out of the receivership estate. The time expended is given only in gross for all the services combined. Such a statement may not be accepted as a basis for fixing allowances.

Moreover even if the time stated had been devoted exclusively to receivership matters, the rate of compensation would still be far in excess of any recognized or approved standard, the rate to Mr. Proctor, being in excess of $190,000 per year, and to Mr. Goode in excess of $50,000 per year.

We have discussed above the insufficiency of the record proof of services performed by the receivers.

We have, however, Mr. Proctor's statement that the total time devoted by him was 1217 hours (R. 20). If the amount allowed him—$122,500—were to be divided by this number of hours, the rate of compensation would be upwards of $90 per hour, or more than $190,000 per year—a sum in excess of a reasonable amount by any recognized standard. But the true hourly rate of compensation is much larger than would result from a division of the amount allowed by 1217. In the first place, not all of the 1217 hours were devoted to the receivership. Mr. Proctor gives this figure as the number of hours he spent (R. 20) "including [the time spent on the affairs of] Eastern Racing Association". The amount of time devoted to the affairs of Eastern Racing Association is nowhere stated, but promptly after the receivership Mr. Proctor became chairman of the board of directors of that corporation (R. 8) and also its general

counsel (R. 20), and the services rendered by him to the Racing Association during the period of the receivership were varied, substantial and time-consuming (R. 7-9). If the time devoted to the Racing Association's affairs be deducted from 1217, the number of hours for which $122,500 has been allowed would be reduced accordingly, and the rate of compensation increased accordingly. Furthermore, the 1217 hours is not all Mr. Proctor's time; it includes, as he states (R. 20), "160 hours spent by other men in the office assisting Mr. Proctor on the Aldred Investment Trust matters". Who these "other men in the office" were—whether juniors or seniors or only clerks—and what their rate of compensation was, does not appear. It is only fair to assume, however, that these "other men in the office" who merely "assisted" Mr. Proctor, would not be compensated by Mr. Proctor for their services at as high a rate as he reserves for himself. To the extent that their rate of compensation is less than Mr. Proctor's, the amount remaining for Mr. Proctor is further increased.

Thus, insofar as Mr. Proctor's services are concerned, the record contains no statement of the time spent by him on receivership matters, and even on the basis of the time spent by him on receivership and non-receivership matters combined, the allowance to him is at a rate substantially in excess of $90 per hour or $190,000 per year.

Mr. Goode has not favored us with any statement of the time he devoted to receivership affairs. All we know about him is that prior to his appointment as receiver he was an "employee" of a stock exchange house (R. 19); that he participated in "conferences" and made "investigations", and evidently supervised the paper work in connection with the receivership; that, with two exceptions, all of the securities constituting the portfolio of the Trust, were disposed before September 1946 (R. 12); whether or

not the receivership occupied Mr. Goode's full time up to that date we do not know, but we do know that from then on "the affairs of the Trust were not a full time job" and required "on the average of about one-half of each working day" (R. 20). How much, if any, of "about one-half of each working day" was put in by Mr. Goode does not appear.

On this "showing", Mr. Goode has been allowed $122,500 for his services as receiver, in addition to upwards of $25,000 received during the same period from Eastern Racing Association.

It is submitted that from any point of view the amount allowed was grossly excessive.

We have already pointed out (*supra*, p. 10), that there is no way of telling from the record how much time the Putnam firm devoted to the affairs of the receivership.

The meager and vague references to what they did (R. 15, 34-35) furnish no adequate basis for the fixing of an allowance; but in any event they demonstrate that the amount allowed is far in excess of recognized or permissible rates of compensation.

In *Guaranty Trust Co.* v. *Seaboard Airline Railway Co.*, 68 F. Supp. 304 (E. D. Va., 1946), the petitioner for allowance alleged without apparent contradiction that "reasonable compensation for a first class New York law firm" is $50 per hour for senior partners and $25 per hour for associates. The District Court allowed compensation at the rate of about $12 per hour.

In re Allied Owners, 79 F. 2d 187 (C. C. A. 2, 1935); cert. den. 296 U. S. 570 was a reorganization proceeding involving an estate of more than $18,000,000. The Court, in reviewing the propriety of an allowance to counsel for the trustees, wrote:

> "* * * These and many other important matters, such as litigation over the Ringling note, requiring skill and experience, are said to have occupied one or more of the partners in Goldwater & Flynn and two of their legal assistants for some 4,508 hours, of which 3,023 were those of their assistants. Many of the things done by these lawyers, as is always the case, were routine matters; many were matters of large importance; many were of a sort preliminary to the reorganization, which has not yet been completed. We think $50,000 is a reasonable compensation for these attorneys, and we award that amount instead of $75,000, to which is to be added their disbursements of $1,247.80 directed to be paid by the District Judge" (p. 191).

Thus, counsel were compensated at an average rate of $11 per hour.

Investigation reveals no precedent for allowances to either receivers or attorneys for receivers, at a rate in excess of $45 per hour. Even if we apply the established rate charged by first class law firms in New York City to private clients for legal services ($50 per hour for partners' time and approximately $25 per hour for associates' time), the award to Mr. Proctor is inordinately high. The observations of Judge Wilkinson in *Lincoln Printing Co.* v. *Middle West Utilities Co.*, 17 F. Supp. 799 (N. D. Ill., 1936), are singularly apposite:

> "At the outset it is to be observed that, by the course of judicial decision, it is established that those who serve as court officers are not to be compensated on the same basis as those who serve in employment by private corporations. A receiver is not to be paid what the president of a corporation would receive for similar ser-

vices. The receivers' attorneys may not be paid according to the standard of compensation for attorneys for private concerns" (p. 801).

Equally appropriate is the language of Judge Evans in *In re Insull Utility Investments Inc.*, 6 F. Supp. 653, 660 (N. D. Ill., 1933):

"The position of receiver being one of honor and trust, an officer of the court, the incumbent must recognize that a substantial part of his compensation must be found in the opportunity to serve. He has, in other words, joined the ranks of those who are public servants, whose compensation never has been and never will be as large as of those engaged in private employment. His compensation must in some ways be compared to the salary of the judge who was sitting on the bench when the appointment was made. An inquiry into the compensation of the United States District Attorney and the Postmaster is appropriate. The salary of the Chief Justice of the United States Supreme Court may well be viewed as the maximum which should be allowed. These are not the sole tests, but it must be recognized that receivers in the Federal courts are in their nature public officers and their compensation must be determined in the light of such facts. Unless the courts can secure the services of such men and unless courts insist upon the selection of such receivers, the task of meeting a situation such as has confronted them since 1929 may well be surrendered to other bodies.

"Unless the appointee looks upon the appointment as an opportunity for real service, he will not be reconciled to this compensation. But until and unless such a

conception of his position is fully established it seems to the writer that the administration of embarrassed or bankrupt companies in the Federal courts will never be satisfactory."

The learned District Judge in making these allowances has ignored or rejected all of the recognized standards and has indulged in what Mr. Justice Taft denominated "vicarious generosity" (*In re Gilbert*, 276 U. S. 294, 296). He has disregarded the precept stated by Judge Hand in *In re New York Investors*, 79 F. 2d 182, 185 (C. C. A. 2, 1935):

> "The Supreme Court has given notice on more than one occasion that receivers and attorneys engaged in the administration of estates in the courts of the United States and in litigation affecting property within the jurisdiction of those courts, should be awarded only moderate compensation and that many of the allowances heretofore awarded have been too high. • • • These declarations of policy by a tribunal which is controlling upon the lower Courts must be kept constantly in mind in dealing with judicial allowances—a subject difficult and unsatisfactory because of lack of any definite standards."

See also: *U. S.* v. *Equitable Trust Co.*, 283 U. S. 738; *Bailie* v. *Rossell*, 60 F. 2d 806 (C. C. A. 3, 1932); *In re Insull Utility Investments*, 74 F. 2d 510 (C. C. A. 7, 1935); *Trustees Corp.* v. *Kansas City M. & O. Railway Co.*, 26 F. 2d 876 (C. C. A. 8, 1928).

The learned District Judge, in fixing Mr. Proctor's allowance, applied an hourly rate at least twice as high as any justified by authority or experience; and in evaluating Mr. Goode's services he made his determination without any evidentiary basis whatever. We respectfully

submit that these were errors resulting in allowances which are inordinate and excessive and constitute an abuse of discretion. The allowances here justify reference by counsel to the admonition in *Penner* v. *Drilling Development Co.*, 293 Fed. 766, 767 (D. Mont., 1923):

> "It must be remembered, though too often forgotten, that receiverships are not to enrich the incumbents and counsel."

POINT III

Sums paid to receiver Goode by Eastern Racing Association should have been deducted from any allowance to him as receiver.

The record discloses that Mr. Goode acted as Treasurer of Eastern Racing Association from April, 1945 to May, 1946 and that during that period he was paid by Eastern Racing Association at the rate of $25,000 per annum (R. 42). The receivers' statement in support of their application states that it was "In order to insure close supervision of the finances and operation of the track" that the receivers caused Mr. Goode to be elected as Treasurer (R. 8). In short, his activities in Eastern Racing Association were but in furtherance of the receivership. As a matter of law, the compensation received by him from Eastern Racing Association must be considered in determining the amount to be allowed him for services as receiver: *Williams* v. *Morgan*, 111 U. S. 684; *In re New York Investors Inc.*, 79 F. 2d 182, 185 (C. C. A. 2, 1935); *In re Insull Utility Investment*, 74 F. 2d 510 (C. C. A. 7, 1935).

In *Williams* v. *Morgan,* this Court required that salaries paid to trustees and receivers be taken into consideration in the fixing of their allowances.

In the *New York Investors* case, the Court reduced compensation to attorneys for receivers in an amount equivalent to that paid to them for legal services in collateral matters, although the sums paid to them did not actually come out of the estate in receivership.

The services performed by Mr. Goode in connection with Eastern Racing Association were performed, as he himself admits, as part of his administration of the Trust. He says (R. 19) that he "devoted his time exclusively to Aldred Investment Trust, including Eastern Racing Association". He is not entitled, we submit, to retain what he received as Treasurer of Eastern Racing Association, a position he occupied to protect the trust estate, and at the same time be paid in full as receiver of the Trust.

POINT IV

It was reversible error for the learned District Judge to refuse to permit petitioners to show the services performed by the receivers and attorneys, and other matters relevant to a determination of the reaseasonable value of their services, particularly in view of the lack of specifications in the moving petitions.

We have already pointed out that the papers upon which the receivers and the Putnam firm applied for allowances are so vague and meager as to be insufficient as a basis for the determination of the reasonable value of their services.

In this state of the record, the attorney for petitioners offered to prove the services performed by the receivers, the time devoted thereto, and other matters relevant to the determination of what would be a reasonable fee for the

services performed. This proof the learned District Judge refused to receive (R. 47). Similarly, in the case of the Putnam firm, as to which the record is even more inadequate, the learned District Court likewise refused to receive proof of the services performed (R. 35).

In a case where claimants fail to set forth facts justifying the allowances requested by them, it is difficult to see how objectants could have been fairer than to offer the claimants the opportunity to supply the deficiencies, if they could, by testifying to the facts. In refusing to receive this proof, we submit, the learned District Judge committed error which makes the allowances aggregating $263,000 improper.

POINT V

While the standards of compensation fixed by the Bankruptcy Act are not binding upon the District Judge in an equity receivership, they are persuasive and should be given expression. Under these standards the allowances here are at least twice as high as they should be.

We recognize that the standards of compensation fixed for receivers under the Bankruptcy Act are not controlling in equity receiverships. Nevertheless, the services performed, the time required, and the skill involved are not different in the one from the other. Hence, the rates of compensation fixed by law for receivers in bankruptcy cases should be given serious consideration in fixing allowances in equity cases. *Walton N. Moore Dry Goods Company* v. *Lieurance*, 38 F. 2d 186 (C. C. A. 9, 1930); Fletcher on Corporations, Vol. 16, p. 536.

Section 48 of the Bankruptcy Act (11 U. S. C. Sec. 76) provides:

"a. The compensation of receivers appointed under this title, for their services payable after they are rendered, shall be as follows:

(1) As custodians. Receivers appointed pursuant to clause (3) of section 11 of this title who serve as mere custodians shall receive such amount as may be allowed by the Court, but in no event to exceed 2 per centum on the first $1,000 or less and one-half of 1 per centum on all above $1,000 on moneys disbursed by them or turned over by them to any persons including lienholders and also upon moneys turned over by them to the trustees and on money subsequently realized from property turned over by them in kind to the trustee.

(2) With full powers. Receivers appointed pursuant to clause (3) of section 11 of this title who serve otherwise than as mere custodians shall receive compensation by way of commissions upon the moneys disbursed or turned over to any persons, including lienholders, by them and also upon the moneys turned over by them or afterward realized by the trustees from property turned over in kind by them to the trustees, such amount as the court may allow, but in no event to exceed 6 per centum on the first $500 or less, 4 per centum on all in excess of $500 but not more than $1,500, 2 per centum on all above $1,500 and not more than $10,000, and 1 per centum on all above $10,000.

(3) Conducting business. Receivers appointed pursuant to clause (3) of section 11 of this title who conduct the business of the bankrupt as pro-

vided in clause (5) of section 11 of this title, shall receive such amount as may be allowed by the court, but in no event to exceed twice the maximum allowance permitted by paragraph (2) of this subdivision a."

The statutory bankruptcy standards have been applied to corporate reorganizations because of abuses inherent in equity receiverships. It is entirely fortuitous that this proceeding is an "equity receivership" instead of a proceeding under the statute designed to supersede such receiverships. Plainly, there is no reason why compensation in a proceeding such as this should exceed the statutory compensation authorized by Congress under the Bankruptcy Act. The fact is that the Courts quite properly have used the Bankruptcy Act standards as their standards in equity receiverships.

If we apply the standards of the Bankruptcy Act to these allowances, on the assumption that the receivers handled $9,000,000, but did not "conduct" a business, their aggregate compensation would be $90,000 as against the $245,000 allowed by the Court.

A business is "conducted" by receivers within the meaning of the Bankruptcy Act where they carry on at least substantially the usual, customary and normal activities of the bankrupt as a going concern. *In re Duke,* 15 F. 2d 92 (E. D. Mo., 1924); *In re U. S. Products Corporation Ltd.,* 57 F. Supp. 239 (N. D. Cal., 1944). Aldred was an investment trust when it came into the hands of the receivers. The business of an investment trust is the purchase and sale of securities, the collection of dividends, and the distribution of profits, if any. Obviously, the receivers were not permitted to engage in such activities, and

there is no pretense that they did; they merely sold off the assets of the Trust when directed so to do by the Court. *In re Slattery & Co., Inc.*, 294 Fed. 624 (C. C. A. 2, 1923), involved a bankrupt investment company. The Court, in dealing with the precise problem under consideration here, wrote:

> "The receiver did not and could not continue the business above described. It is plain that he could not buy new securities nor invest the securities which came into his hands, and of necessity the 'partial payment plan' could not be continued by the receiver in the manner conducted by a going concern" (p. 627).

The decision affirmed an order of the District Judge denying double commissions, where the District Judge wrote:

> "His [the receiver's] activities were directed to the preservation of the assets, and in reducing some of them into cash. The mere incident that the assets largely consisted of stocks and bonds, which, by reason of their hypothecation as security for loans of the bankrupts, necessitated careful handling and a method of procedure differing from that usually employed in bringing about liquidation, does not differentiate the case from a liquidation in which the assets are disposed of in ordinary course" (p. 625).

Even if the receivers were entitled to be compensated according to the standards established in sub-section (a) (3) of Section 48 of the Bankruptcy Act, on the theory that they were engaged in "conducting" the business of Aldred, their aggregate compensation could not exceed $180,000 (less deductions for moneys received from Eastern Racing Association), as against the $245,000 allowed by the Dis-

trict Judge. Moreover, even a receiver who conducts a business is not automatically entitled to the rate specified in sub-section (a) (3); this section merely fixes the *maximum*. Here the allowance is $65,000 beyond the permissible maximum to receivers in bankruptcy who conduct the business, although there is no basis for applying any standard but the lower standard applicable to receivers who are merely "custodians".

The authorities are clear that the aggregate compensation to receivers may not be increased because there is more than one. (*In re Mills Tea & Butter Co.*, 235 Fed. 813 (D. Mass., 1916); *In re Luna Amusement Co.*, 6 F. Supp. 838 (E. D. N. Y., 1934).)

POINT VI

The suggestion in the petition for allowance that the receivers' compensation should reflect their acumen in bringing the estate out of insolvency is misleading. To the extent the transition was due to the sale of Eastern Racing Association stock at a huge profit, the credit is due to petitioners and not to the receivers, and as far as the sale of the remaining assets is concerned, the advantageous prices received were, as the Court of Appeals has previously held herein, the result of "mere chance" and "post-war stock market inflation."

The learned District Judge apparently predicated the allowance of $245,000 to the receivers upon their supposed accomplishment "in converting a deficit of $2,300,000, into an equity of substantially $1,800,000" (R. 31).

When petitioners first appeared in this matter in January, 1946, the stock of Eastern Racing Association—the principal single asset of the Trust—was being traded in

small lots at about $120 per share, or a hypothetical value for the entire block owned by the Trust of approximately $1,800,000. On January 29, 1946 at a confernce in the chambers of the District Judge, the receivers did not question the view expressed by the District Judge that $1,500,000 appeared to be the best price obtainable for the block of the Racing Association stock owned by the Trust. Not until the memorandum prepared by petitioners* on the subject of Eastern Racing Association, Inc., indicating a market value of at least $200 per share, was widely circulated by petitioners did the market reflect this value. It was, in fact, only because the petitioners concluded that the Eastern Racing stock had a value in excess of $200 per share that they bought the controlling stock of Aldred; it was this conclusion, ably elucidated and amply documented in said memorandum, and widely circulated by petitioners among persons who might be interested in acquiring the stock, which resulted in the increase in the market value of the stock from approximately $120 per share on January 17, 1946 to $240 per share on April 17, 1946, and in its sale for $3,600,000, or $2,100,000 more than its assumed value before petitioners interested themselves in creating a market for the stock at a fair price.

As for the explanation of the increase in the value of the other securities in the portfolio of the Trust, see *Bailey* v. *McLellan,* 159 F. (2nd) 1014 (C. C. A. 1, 1917), another phase of this case, in which the Court of Appeals said:

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* This memorandum is reproduced in the Transcript of Record in *Bailey* v. *Proctor* (another phase of this case), at pages 79 to 83 inclusive. The said Transcript of Record is incorporated in the Transcript of Record on the instant appeal, by reference (R. 56). A reading of the earlier Record emphasizes that prior to the sale of the Eastern Racing Association stock, it was the petitioners alone who insisted that the stock had a value far beyond its then market price. The attitude of the Receivers on this point is best indicated by their concurrence in the view of the learned District Judge that $1,500,000 appeared to be the best obtainable price.

> "The fact that the market for securities rose during this protracted period and that the sale of the Racing Association stock was an advantageous one, was mere chance * * *" (p. 1017)

and *Bailey* v. *Proctor*, 160 F. 2nd 78, 83 (C. C. A. 1, 1947), still another phase of this case, in which the Court of Appeals recognized that the doubling in value of the securities was "due to a post-war stock market inflation."

The sale of these securities in June and July of 1946 was a consequence of the order of June 19, 1946 directing liquidation. It did not reflect a premonition on the part of the receivers that in September, 1946 the market would experience a violent recession.

Certainly, there is nothing in this record which evidences so vast an accomplishment on the part of the receivers as to justify the abandonment of every recognized principle of compensation in judicial proceedings, and to compensate the receivers at a rate which exceeds all standards recognized and followed by the Courts.

CONCLUSION

The petition for a Writ of Certiorari should be granted.

Respectfully submitted,

JESSE CLIMENKO,
Attorney for Petitioners.

GEORGE TROSK,
MILTON S. GOULD,
HENRY M. LEEN,
of Counsel.

[redacted]

[redacted]

October Term, 1908.

No. 676.

FRANK BAILEY [redacted], Intervenors, Petitioners,

vs.

EDWARD O. PROCTOR [redacted], Receivers.

BRIEF OF RESPONDENT RECEIVERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

EDWARD O. PROCTOR, for himself and
EDWARD F. GOODE as Receivers.

ANDREW G. CHEESMAN & SON, LAW PRINTERS, DENVER.

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CASES.

Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 676.

FRANK BAILEY ET ALL., *Intervenors, Petitioners,*

v.

EDWARD O. PROCTOR ET AL., *Receivers.*

BRIEF OF RESPONDENT RECEIVERS IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI.

THE POINTS OF DECISION OF WHICH REVIEW IS SOUGHT.

The petitioners seek review of a decision of the Court of Appeals for the First Circuit affirming an order of the District Court, District of Massachusetts, granting the receivers of Aldred Investment Trust a final allowance of $170,000 in addition to $75,000 previously granted them, and authorizing the receivers to pay $18,000 to Putnam, Bell, Dutch & Santry for certain legal services performed for the Trust before and during the receivership.

The memorandum of decision of the District Court upon the allowance to the receivers is at pages 30-32 of the Record. The Per Curiam opinion of the Court of Appeals, holding that the allowances "fell within the allowable limits of the district court's discretion," is at pages 59, 60. It is officially reported in 171 F. (2d) 980.

The petitioners claim that the allowance to the receivers was excessive, and that said allowance and that to the Putnam firm were based upon an inadequate record.*

BRIEF STATEMENT OF FACTS.†

The essential facts are contained in the receivers' statements in support of their joint petition for allowance (received without objection) (R. 5-20); the transcript of the hearing (R. 32-53); seven documentary exhibits (transmitted to the Court of Appeals) (R. 55), and the records and opinions of the Circuit Court of Appeals on six previous appeals (R. 56; referred to by the Court of Appeals, R. 60).‡

The petitioners are a group of shareholders who bought the so-called "free shares" of the original defendant trustee Hanlon, January 15, 1946 (R. 10) (nearly a year after the receivers' appointment), and, on the strength of their ownership of the shares so acquired, intervened in these proceedings February 19, 1946 (R. 2, 3). They were the only opponents of the receivers' petition for compensation.

*The petition (at p. 4) alleges that "In the course of the receivership, the District Judge made other allowances to attorneys aggregating $119,000," which, in the following paragraph, are included as "expenses of administration" in bringing "the administrative costs of the receivership to approximately $450,000" (R. 4). This is incorrect. The $119,000 was not an administrative cost of the receivership. Of this amount $89,000 was paid to lawyers who had brought a minority stockholders' bill against the Aldred Trustees which the S.E.C. had the benefit of in its suit (see *Bailey* v. *McLellan*, 159 F. (2d) 1014); $20,000 was paid to counsel for a committee of debenture holders, and $10,000 to counsel for these petitioners.

†The petition and supporting brief contain so many erroneous and misleading statements that our statement of facts is longer than it would have been otherwise.

‡Some of the alleged deficiencies of proof of the receivers' services are supplied by these exhibits and records which the petitioners have not upon this petition brought before this Court.

The complainant Securities and Exchange Commission appeared by counsel and recorded its belief that the allowance of the amount claimed was within the sound discretion of the Court (R. 32, 33, and Opinion of Court of Appeals, R. 60). Furthermore, counsel for these very petitioners, when queried by the District Judge as to what he believed was fair compensation, stated: "as a practical matter . . . the range of fees ought to be between $150,000 and $180,000 gross, that being the range indicated by the Bankruptcy Act according to the amount of the estate, which was between eight and one-half and nine million dollars . . . ," which, he stated, "I think would be an extremely fair and defensible award and based upon a rational standard in evaluating the receivers' service" (R. 50).*

The petitioners have not fared ill. For the shares which they purchased from Hanlon at $150,000 they are receiving $1,144,000, a profit of nearly $1,000,000 (R. 18, 19), and they have been permitted to continue the existence of the Trust solely that they may not be required to pay a capital gains tax on this profit. *Bailey* v. *Proctor,* 166 F. (2d) 392 (1948).

On January 19, 1945, the District Court appointed Edward O. Proctor, a lawyer, and Edward F. Goode, an employee of the investment firm of Spencer Trask & Company (R. 19), receivers of Aldred Investment Trust. The date of the allowance of their compensation was July 29, 1948 (R. 30). They had, therefore, been receivers three and a half years. The aggregate assets of the Trust when the

*At the time Mr. Gould made this statement Mr. Proctor stated: "I would just like to point out, your Honor, that Mr. Gould's figure of $180,000 is $65,000 less than the amount we are asking for. I think that $65,000 would not be too far out of the way to allocate to the litigation which was entirely in addition to the [usual] services rendered to the estate"; to which Mr. Gould replied: "I must say in reaching that figure I had assumed that included in it all of the services, including the litigation" (R. 50).

receivers took them over were worth approximately $3,640,000. Against these assets there was an outstanding indebtedness represented by debentures in the amount of $5,900,000 carrying 4½% interest (R. 6). The liabilities, therefore, at that time exceeded the assets by approximately $2,300,000 (R. 6, 7).

During the receivership, over the opposition of these petitioners, the $5,900,000 of debentures were paid in full, with accrued interest. Interest payments during the receivership totaled $685,875. The 171,500 common shares which at the beginning of the receivership had no value have a liquidating value of approximately $10.40 a share. During the receivership, therefore, a deficit of approximately $2,300,000 was translated into an equity of almost $1,800,000 (R. 7).

One of the principal assets of the Trust (the acquisition of which by the trustees was the immediate cause of their removal) was 14,991 shares (a bare majority) of Eastern Racing Association, Inc., which owned and operated a horse racing track known as Suffolk Downs (R. 6). At that time there was a government ban on horse racing throughout the country (R. 7). The receivers ousted the former trustees from control of the Racing Association, caused themselves and their appointees to be elected, made Mr. Goode treasurer, and successfully operated the track during the 1945 racing season, producing dividends for the receivership estate of $360,000. Subsequently, upon their petition to the District Court, the receivers sold the shares at public auction on May 1, 1946, for $3,600,000, showing a profit to the Trust over the cost of the shares of $2,400,000 (R. 11).*

*The allegations in the petition that Mr. Proctor's statement of his time includes "time spent on matters not compensable by the receivership estate" (Pet'n, 6) and on "non-receivership matters" (Pet'n, 13) refers to Mr. Proctor's services in protecting this important asset of the Trust (R. 7-9).

The receivers also succeeded to the defense of a pending equity suit against the Trust to rescind an exchange of securities between the Trust and a corporation in which Mr. Aldred had been president and a director.* The securities which the complainant sought to get back from the Trust attained during the course of the litigation a value of $440,000. The stock which the Trust had given in exchange was worth nothing. The receivers were joined as parties respondent and Mr. Proctor thereafter conducted the litigation, tried the case, obtained a decision dismissing the bill with costs, and upon an appeal won the case before the Massachusetts Supreme Judicial Court, thus saving the Trust substantially $440,000 (R. 14, 15).†

The large blocks of the securities held by the Trust, lists of which also appeared in the exhibits (Ex. 1, R. 55), involved difficult problems, some of which are described in the receivers' statement (R. 13, 14).

At pages 22-23 of the petition is the following statement which is flagrantly false:

> "The business of an investment trust is the purchase and sale of securities, the collection of dividends, and the distribution of profits, if any. Obviously, the receivers were not permitted to engage in such activities, and there is no pretense that they did; they merely

*_Murphy_ v. _Hanlon_, 322 Mass. 683.

†The allegations in the petition that "who tried the case and who took the evidence is not stated" (Pet'n, 10) and that the *only legal service* performed by Mr. Proctor (in this matter) was the preparation of findings, that he spent "practically (a) a whole day" arguing the case in the Superior Court and collaborated in preparing the brief and argued the case before the Full Court (R. 9), would seem to be a deliberate misstatement. Besides the statement that Mr. Proctor conducted the litigation (R. 15), the Courts below had as an exhibit before them the entire record of the case on appeal, with all the testimony, showing that Mr. Proctor tried the case (R. 55, Ex. 2).

sold off the assets of the Trust when directed so to do by the Court."

As to *purchase and sale of securities,* during the first year and a quarter of the receivership the market was rising and the securities which the receivers held, with a single exception, were sound and their market value constantly rising. The receivers were constantly engaged in investigation and research into the value of these securities, and as soon as they believed that the market was near its peak they disposed of the bulk of them (R. 12, 13). As fast as the securities were sold, they reinvested the proceeds in short-term government notes and upon the maturity of such notes reinvested in other government notes, so that they constantly kept the bulk of the trust assets in income-producing securities (Financial Reports, Ex. 1).

With respect to the *collection of dividends,* the receivers collected altogether $689,184.03, plus interest on government notes of $77,445.65 (Financial Reports, Ex. 1).

With respect to *distribution of profits,* the receivers have distributed in the form of interest on debentures $685,875.00 (Receivers' Statement, R. 7).

In addition to these normal activities of an investment trust, the receivers, as above stated (p. 4), during the first year of their administration, managed and operated Eastern Racing Association by reason of the Trust's majority stock interest therein.

The receivers did not "*merely sell off the assets of the Trust when directed to do so by the Court.*"

The only asset which the receivers sold at the direction of the Court was the stock of Eastern Racing Association, and that direction was on their own initiative and petition filed February 13, 1946 (Record, *Bailey* v. *Proctor,* Oct. Term, 1945, No. 4185, p. 49), allowed, after hearing, over the vigorous protest of these petitioners, on March 13, 1946 (same Record, pp. 86, 87).

The sale of other securities of the Trust and the reinvestment of the proceeds in government short-term securities began in March, 1946, continuing in April, May and June (Receivers' Statement, R. 12).* This period of selling bore no relation to the Court's order of June 19, 1946, to liquidate, most of the sales preceding that order, but was dictated solely by the receivers' judgment that the market had reached its peak, as the subsequent event proved (R. 12).†

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*The proceeds from sales of securities (exclusive of Eastern Racing), as shown by the receivers' monthly accounts to the Court, were:

March	$50,947.45
April	139,621.87
May	659,539.17
June	1,076,634.99
	$1,926,743.48

†The judgment of January 19, 1945, under which the receivers were appointed, provided:

> "That Edward O. Proctor, of Newton, and Edward F. Goode of Boston, be and they hereby are appointed receivers for the defendant, the Aldred Investment Trust, and all of the property of the defendant Trust, . . . *to run and operate such property and the business of the defendant Trust* and to collect and receive the rents, issue, profits and income thereof and therefrom, to make such payments and disbursements as may be needful and proper in the operation of such property and business by the receivers, and to incur such expense as may be necessary or advisable in the operation thereof and to enter into contracts in the regular course of conduct of the business of the defendant Trust; *in general, to operate the property and business of the defendant Trust in the manner best calculated in the opinion of said receivers fully to protect the business and property and good will and value of the rights of the defendant Trust and to prevent the sacrifice thereof, and to purchase, and to sell and deliver securities of the defendant Trust*" (Record, *Bailey* v. *Proctor*, Oct. Term, 1945, No. 4185, pp. 27, 29) (italics ours).

It was not until June 19, 1946, that the receivers were ordered to liquidate the Trust. On that date the District Court for the

ARGUMENT.

1. THE ALLOWANCE OF FEES TO THE RECEIVERS RESTS IN THE SOUND DISCRETION OF THE DISTRICT COURT AND IS NOT REVIEWABLE EXCEPT WHERE A CLEAR ABUSE OF DISCRETION IS APPARENT.

Crites, Incorporated, v. *Prudential Insurance Co.,* 322 U.S. 408, 418 (1944).

Trustees v. *Greenough,* 105 U.S. 527, 537 (1881).

May v. *Midwest Refining Co.,* 121 F. (2d) 431, 440 (C.C.A. 1st 1941); cert. den. 314 U.S. 668 (1941).

Gochenour v. *Cleveland Terminals Bldg. Co.,* 142 F. (2d) 991 (C.C.A. 6th 1944); cert. den. 323 U.S. 767.

2. IN CONSIDERING WHETHER THERE WAS AN ABUSE OF DISCRETION THE APPELLATE COURT TAKES INTO CONSIDERATION THE TRIAL JUDGE'S PERSONAL KNOWLEDGE AND FAMILIARITY WITH THE NATURE OF THE PROBLEMS INVOLVED IN THE LITIGATION AND THE CHARACTER OF THE SERVICES RENDERED.

In his memorandum of decision the District Judge records that his determination was made upon a review of all the statements and documents "in the light of its [his] own

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first time rejected proposed plans of reorganization and directed that "the receivers are hereby ordered to proceed to liquidate the Trust" (Record, *Bailey* v. *Proctor,* Oct. Term, 1945, No. 4185, p. 131).

Even then the mandate to liquidate was not conclusive, for these petitioners procured a stay of the order and appealed to the Circuit Court of Appeals and, upon affirmation on February 24, 1947 (160 F. (2d) 78), applied to this Court for certiorari, which was not denied until June 2, 1947 (331 U.S. 834).

It was therefore not until June 2, 1947, that the receivers could proceed on the assurance that the Trust was to be liquidated.

close supervision over the affairs of the receivership from its inception" (Memorandum of Decision, R. 30). And at the hearing, when counsel for the appellants indicated a desire to call Receiver Goode to the stand to be questioned as to his "professional training and what his earning power is" (R. 47), the Court said: "No, I don't think it is necessary. It has never been done in these cases. Here we know what we are dealing with. I have a very good knowledge of Mr. Goode's background and business judgment. . . ."

The Appellate Court takes into consideration the trial judge's familiarity with the situation, especially where that appears, as here, a matter of record.

> *Gochenour* v. *Cleveland Terminals Bldg. Co.*, 142 F. (2d) 991 (C.C.A. 6th 1944); cert. den. 323 U.S. 767.
>
> *Bailey* v. *McLellan*, 159 F. (2d) 1014 (C.C.A. 1st 1947).
>
> *Godfrey* v. *Powell*, 159 F. (2d) 330, 331 (C.C.A. 5th 1947).
>
> *Sullivan & Cromwell* v. *Colorado Fuel & Iron Co.*, 96 F. (2d) 219 (C.C.A. 10th 1938).
>
> *In re Tower Bldg. Corporation*, 88 F. (2d) 347 (C.C.A. 7th 1937).

In the instant case, moreover, the Court of Appeals also was thoroughly familiar with the receivership, as noted in its opinion: "We are quite familiar with this receivership as a result of our consideration of numerous previous appeals," citing six appeals (R. 60).

3. The record is sufficiently clear and definite to serve as a foundation for the granting of the allowance.

There was evidence in the record which, taken together with the District Judge's personal knowledge and familiarity with the case, was sufficiently full, clear and definite to support the District Court's decision.

While Mr. Gould's statement for these petitioners (R. 21-29) complained that the original statement of the receivers (R. 5-19) contained insufficient information about the time spent by the receivers, he conceded at the hearing that the receivers' supplementary statement (R. 19-20) "to a large extent" "rectified" "that deficiency" (R. 39); and see the District Court's Memorandum (R. 30).

There is no rule of law requiring the itemization of time spent.

> *Stein* v. *Hemker*, 157 F. (2d) 740 (C.C.A. 8th 1946).

Certainly under the circumstances in the present case such an itemization was not indispensable and would not have been particularly helpful.

Receiver Goode "devoted his time exclusively to Aldred Investment Trust, including Eastern Racing Association." After the securities (excepting Eastern Gas & Fuel preferred) were sold, he spent an average of about one-half of each working day (R. 20), and his employment as receiver required his resignation from Spencer Trask & Company since the New York Stock Exchange would not permit an employee of a member firm to devote his time to looking after the affairs of an investment trust (R. 19), so that it was not possible for him to resume his former position while employed as receiver (R. 20). The general character of Receiver Goode's services is fully set out in the receivers' statement (R. 5-20).

With respect to Receiver Proctor, besides the usual duties of a receiver, he acted as general counsel for the receivers, as well as Eastern Racing Association until the receivers sold its stock on May 1, 1946, and represented the receivers in all matters of litigation (Statement, R. 20). He submitted a statement of the number of hours shown by the books of Ropes, Gray, Best, Coolidge & Rugg spent on Aldred Investment matters, including Eastern Racing Association, showing 776 hours plus 175¾ spent on the case of *Murphy* v. *Hanlon et als.* In addition to this their books show 160 hours spent by other men in the office assisting Proctor on Aldred Investment Trust matters. The office records of Dever & Proctor show 178 hours spent on Aldred Investment Trust matters, plus 87¼ hours in the case of *Murphy* v. *Hanlon*, the total time charges for Proctor aggregating 1217 hours (R. 20).

The foregoing information was adequate to enable the Court to determine the time properly required to be spent on the matter, which is, of course, one of the elements, but by no means the only one, to be taken into consideration.

With respect to the other important elements in the fixing of the receivers' compensation the record is complete and explicit. Such are (1) the value of the property involved, (2) the difficulty of the problems and (3) the results achieved.

4. The compensation fixed by the District Court was within the reasonable exercise of its discretion.

The District Court was fully justified in fixing the compensation of the receivers at $245,000.*

*The application for the final allowance of $170,000 was filed jointly by the receivers, who have throughout shared the fees of the receivership equally as they have shared the duties and responsibilities equally.

A. First, with respect to *the amount of property involved,* it represents approximately two and seven tenths per cent (.0272) of the $9,000,000 assets administered by the receivers, a percentage which is not at variance with the standards of the Bankruptcy Act where the receivers conduct the business of the bankrupt, and taking into consideration the fact that one of the receivers acted throughout as counsel for the receivers (Memorandum of Decision, R. 32).

B. As to *the difficulties involved,* there were many, including more particularly (1) the management for a year of Eastern Racing Association and the sale of that important asset of the Trust; (2) the investigation into the affairs of corporations of which the Trust held large blocks of securities, to determine whether such securities should be held or sold and the favorable times for sale; (3) whether the Trust should be reorganized or liquidated; (4) the conduct of the litigation itself, both in the District Court and the Circuit Court of Appeals; and (5) the preparation, trial and argument on appeal of the *Murphy* v. *Hanlon* case, all of which are fully described in the receivers' statement (R. 6-18).

C. As to *the results obtained,* they are briefly summarized in the receivers' statement:

> "On July 1, 1947, the $5,900,000 of debentures were paid in full, with accrued interest. Interest payments during the receivership totaled $685,875. The 171,500 common shares which at the beginning of the receivership had no value, now have a liquidating value of approximately $10.40 a share, of which $5.50 a share has already been paid by way of partial distribution. This applies both to the 59,000 shares attached to the debentures and the 112,500 so-called 'free' shares.

> During the receivership, therefore, a deficit of approximately $2,300,000 has been changed into an equity of almost $1,800,000" (R. 7).

The petitioners sought to belittle the receivers' share in accomplishing this result by claiming that it was due to "mere chance" and to their own efforts in publicizing the value of Eastern Racing shares (Attorney Gould's Statement, R. 25-27), but the District Court, in the light of its own intimate knowledge of the situation, found:

> "While it is true that the favorable result of the receivership in converting a deficit of $2,300,000 into an equity of substantially $1,800,000, could not have been obtained without the rise in the security market and the temporary extraordinary public interest in horse racing combined with easy money at the time of the receivers' sale of the Eastern Racing Association shares, this result was in large measure attributable to the judgment of the receivers both as to the time and methods of disposing of this asset of the Trust. The receivers disposed of the general securities of the Trust at prices not far from the highest in the market range during the receivership, and it is common knowledge that the market has since experienced pronounced recessions. I think that it is generally conceded by everyone that the Eastern Racing Association shares were sold at the very peak of the market, and that their present value is much less than at the time of the receivers' sale." (Memorandum of Decision, R. 31.)

Petitioners at the hearing below (R. 44, 45) and in their brief here (Point VI, pp. 24-26) argue that the District Court in evaluating the receivers' services was bound to

find that they contributed nothing to the favorable outcome of the receivership because the Circuit Court of Appeals in *Bailey* v. *McLellan*, 159 F. (2d) 1014, stated in the course of its opinion:

> "The fact that the market for securities rose during this protracted period and that the sale of the racing association stock was an advantageous one was mere chance . . ."

This remark, however, was made in answer to a claim by the attorney for the ousted trustees to have his compensation paid out of the Trust assets, on the ground that his protraction of the defense pushed the case into a period of higher values (Record, *Bailey* v. *McLellan*, Oct. Term 1945, No. 4197, at p. 81). Certainly, so far as said attorney's services were concerned, the fact that they were followed by trebling of the Trust assets was purely fortuitous. It was a case of *post hoc, non propter hoc.*

The District Judge, therefore, was entirely justified, when the passage was quoted at the hearing below, in saying: "I won't accept that statement. I think it was a remarkable figure, obtaining the price that they did. If you look at the history of the stock sales you will find you got about the high in the sales. That is not chance. I won't accept that statement of the Circuit Court of Appeals" (R. pp. 44, 45), and in his memorandum of decision the Judge found that the favorable result of the receivership "was in large measure attributable to the judgment of the receivers both as to the time and methods of disposing of this asset [Eastern Racing Association shares] of the Trust" and that "the receivers disposed of the general securities of the Trust at prices not far from the highest in the market range during the receivership" (R. 31).

The petitioners' claim that the credit for the advantageous sale of the Eastern Racing Association stock was

due to them and not to the receivers (Pet'n, Point VI, pp. 24-26) has never received judicial acceptance.

5. THE DISTRICT COURT TOOK INTO CONSIDERATION THE SUM PAID TO RECEIVER GOODE BY EASTERN RACING ASSOCIATION AND WAS JUSTIFIED IN NOT DIMINISHING THE PRESENT ALLOWANCE BY THAT SUM.

Petitioners' claim that "sums paid to receiver Goode by Eastern Racing Association should have been deducted from any allowance to him as receiver" refers to the $25,000 paid him for his services as treasurer of that Association during the year of its operation by the receivers.

The cases cited by the petitioner are to the effect that salaries paid to receivers must "be taken into consideration in the fixing of their allowances" (Pet'n, 19).

The District Judge did take into consideration the sum paid Mr. Goode, as stated in his memorandum of decision (R. 31, 32), and his decision on this point clearly was not an abuse of discretion.

CONCLUSION.

In conclusion, the receivers respectfully submit that there was neither error of law nor abuse of discretion in this case and that this petition should be denied.

Respectfully submitted,

EDWARD O. PROCTOR, for himself and
EDWARD F. GOODE as Receivers.

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Supreme Court of the United States.

OCTOBER TERM, 1948.

No. 676.

FRANK BAILEY ET AL., *Intervenors-Petitioners,*

v.

EDWARD O. PROCTOR ET AL., *Receivers.*

ON APPLICATION OF RECEIVERS AND ATTORNEYS FOR ALLOWANCES.

BRIEF OF RESPONDENT PUTNAM, BELL, DUTCH & SANTRY IN OPPOSITION TO PETITION FOR CERTIORARI.

Statement.

So far as this respondent is concerned, the petitioners seek review of a decision of the Court of Appeals for the First Circuit, January 17, 1949 (R. 61), affirming an order of the United States District Court for the District of Massachusetts entered July 29, 1948, allowing the claim of Putnam, Bell, Dutch & Santry for services (R. 30). This claim is in the amount of $18,000 for services, plus minor disbursements, and came before the District Court on the petition of the receivers, stating that they had approved

the claim, for leave to pay it (R. 4). The per curiam opinion of the Court of Appeals is set out at R. 60, 61, and reported in 171 F. (2d) 980.

With respect to the order of the District Court so far as it concerns this claim, appellants stated as their only point on appeal to the Court of Appeals:

> "6. The District Court erred in allowing the claim of Putnam, Bell, Dutch & Santry without requiring that the amount of the claim, as allowed, be deducted from the aggregate compensation allowed to receivers" (R. 57).

In their petition to this Court, petitioners claim that the allowance to the Putnam firm was based on an inadequate record and that the District Judge erred in refusing, so petitioners allege, to permit petitioners to show the services performed by the attorneys and other relevant matters (Petition for Certiorari, points 1 and 4, pages *i*, *ii*).

Statement of the Case.

The claim by Putnam, Bell, Dutch & Santry is for services rendered as attorneys to the receivers in the case of *Murphy, Trustee of International Power Securities Corporation,* v. *Hanlon et als., Trustees of Aldred Investment Trust,* which was brought in the Superior Court for Suffolk County, Commonwealth of Massachusetts, and appealed (by Murphy) to the Supreme Judicial Court for the Commonwealth. This firm was counsel for the Trust in the conduct of the case prior to the receivership and continued thereafter as associate counsel.

The case was an action to rescind the exchange in 1939 of certain securities between International Power Securities Corporation and Aldred Investment Trust. At the

time of the exchange some of the directors and trustees and also officers were interlocking. The bill alleged domination by Aldred, fraud, and breach of fiduciary duty (Ex. 3, pp. 2-3 (R. 55)).

As the brief to the Massachusetts Supreme Court (Ex. 3) shows, as does also the record (Ex. 2, R. 55), the defense of the case required careful preparation both as to facts and law, including extended consideration of the law as to interlocking directors, critical examination of balance sheets, financial statements, corporate records, oral and written depositions. The case was tried for five days in the Superior Court, requests for findings were prepared, the case was argued before the trial judge, an extended brief was filed to the Supreme Judicial Court and the case was argued there (R. 15, Ex. 2). After the appointment of the receivers, partners of the appellee firm (Mr. Dutch and Mr. Bancroft) rendered very extensive assistance to the receivers in these various matters (R. 14, 15, 33-35).

In their petition, intervenors erroneously state that Richard Bancroft was "an associate of the Putnam firm" (Petition, p. 9; see also p. 10). He was a member of the firm, and the record clearly so states (R. 14).

The amount at issue was approximately $440,000 (R. 15), and as is shown by the careful opinion of Qua, C.J., the case was involved, and affirmance was "notwithstanding some evidence tending to raise doubts." *Murphy* v. *Hanlon*, 322 Mass. 683, 693 (1948).

Point Relied Upon.

The affirmance by the Court of Appeals of the allowance by the District Court of the petition by the receivers for leave to pay the claim of Putnam, Bell, Dutch & Santry, which the receivers had approved, is free from error.

Argument.

I. THERE IS NO ERROR IN ALLOWING THE CLAIM OF THE PUTNAM FIRM WITHOUT REQUIRING THAT THE AMOUNT BE DEDUCTED FROM THE AGGREGATE COMPENSATION ALLOWED TO THE RECEIVERS.

The only point stated on appeal to the Court of Appeals, so far as the claim of the Putnam firm is concerned (quoted *supra*, at p. 2), is not urged to this Court by petitioners.

There is no dispute that services were rendered by these appellees; their nature and extent is explained as appears in the record (R. 14-15, 33-34). The propriety of the use by the receivers of the services of this appellee is not questioned. The Court was fully aware of the situation when compensation was awarded to the receivers, and their statement in support of their petition took this claim into account (R. 15, 35). No reason exists why the order approving this claim should require that the amount allowed should be deducted from the compensation allowed to the receivers.

II. THE ALLOWANCE OF THE CLAIM OF THE PUTNAM FIRM IS SUPPORTED BY A PROPER RECORD.

1. The petitioners for certiorari are in error in stating to this Court that the District Judge refused to permit petitioners to show the services performed by the receivers and attorneys. They state in their brief, at page 20, that "the learned District Court likewise refused to receive proof of the services performed" by the Putnam firm, referring to R. 35. The record shows that the Court stated:

> "I do not think I want to take the testimony of Mr. Dutch or Mr. Bancroft. I am familiar with it. I am confronted with the same problem that Mr. Gould pre-

> sents, and I do not think I am going to need anything further about their services, unless there is something they want to say."

The attorney for the petitioners raised no objection and did not ask for the right to examine either Mr. Dutch or Mr. Bancroft, who were present in the courtroom. The obligation rested on the intervenors to state their grounds of objection to the claim of Putnam, Bell, Dutch & Santry, and the other side would then reply. The Court stated: "The petition is filed and generally we permit the opposition to be heard first." The attorney for the intervenors then stated: "I certainly have no objection to that. I am prepared to go ahead on that basis" (R. 36).

2. The petitioners for certiorari are in error in stating to this Court as to the allowance of $18,000 to the Putnam firm:

> "All there is in the record on the subject is the statement of Mr. Proctor, one of the receivers, that prior to receivership the Putnam firm represented the Trust in the Murphy case; that that case took five days for trial; that during the receivership a member of the firm assisted Mr. Proctor in preparing findings and a brief in that case, and that the firm did 'a considerable amount of work'" (Petition, p. 5).

The statement in support of receivers' petition contains the following:

> "Prior to the receivership, on December 8, 1941, John J. Murphy, trustee of International Power Securities Corporation, brought a bill in equity against the trustees of Aldred Investment Trust in the Suffolk Superior Court to rescind an exchange of securi-

ties between the Corporation and the Trust. . . . The Trust prior to the receivership was represented by Putnam, Bell, Dutch & Santry; more particularly by Messrs. Dutch and Bancroft of that firm. Depositions had been taken by both sides.

"The receivers were joined as parties respondent March 13, 1945 and Mr. Proctor immediately thereafter filed an appearance for the receivers and from that time on conducted the litigation for the defendants.

"As early as February 20, 1945 the receivers had conferred with Messrs. Dutch and Bancroft relative to this litigation. . . .

"Mr. Proctor, assisted by Mr. Bancroft, prepared requests for findings and argued the case before the judge in Springfield June 22, the argument taking practically the full day. . . . The plaintiff appealed. Mr. Proctor, with Mr. Bancroft's assistance, prepared a sixty-two-page brief and argued the case before the Full Court January 6, 1948" (R. 14, 15).

It was stated by Mr. Proctor at the hearing before the District Judge:

"Messrs. Putnam, Bell, Dutch & Santry had been Hanlon's attorneys when he was in control of the Trust and the Murphy case was brought while he was head of it. They had, accordingly, done a considerable amount of work up to the time of the receivership and had prepared quite an extensive memorandum both on the facts and the law. The receivers immediately took charge of the litigation, and I entered an appearance for the receivers and conducted the litigation thereafter. But it was the kind of case, both in connection with its conduct and the amount involved,

that required very careful preparation, not only on the law but in the analysis of the facts, etc. The services consisted of conferences that Mr. Dutch had with me and very active preparation and trial of the case, preparation of requests for findings, and arguments and briefs before the Supreme Judicial Court. Mr. Bancroft actively assisted me there; and it seems to me that the charges are reasonable" (R. 34).

The District Court also had before it the record of the case on appeal and the brief to the Massachusetts Supreme Court (R. 53, 55).

3. It is submitted that the District Court properly took into account his own familiarity with the proceedings.

In *Gochenour* v. *Cleveland Terminals Bldg. Co.*, 142 F. (2d) 991 (C.C.A. 6, 1944); cert. den. 323 U.S. 767, an allowance to appellees, attorneys, was affirmed. The Court states at page 995:

> "The trial judge is familiar with proceedings in his court and also has expert knowledge as to the value of legal services. He should, therefore, have a broad discretion on the subject since he has a far better means of measuring what is just and reasonable than an appellate court. *Trustees* v. *Greenough*, 105 U. S. 527, 537, 26 L. Ed. 1157. The trial judge stated that the court had personal knowledge and a full understanding of the nature of the problems involved in the litigation here and the character of the services to be rendered by appellees and that the court knew the nature, extent and value of the legal services required and the type of services performed."

To the same effect is *Bailey* v. *McLellan,* 159 F. (2d) 1014, 1016 (C.C.A. 1, 1947); cert. den. 331 U.S. 834.

III. There was no abuse of discretion.

The receivers, who were thoroughly familiar with the services rendered, by virtue of their conduct of the litigation, and who are in an entirely independent position, approved the claim (R. 4, 33). The services rendered are summarized by the receivers in the record (R. 4, 14-15, 33-35). The Court was familiar with their nature and extent (R. 35).

Under these circumstances the approval by the District Court of the petition for leave to pay the claim of this appellee cannot be called an abuse of discretion (R. 4).

Conclusion.

There is no error in the action of the Court of Appeals in affirming the order of the District Court that the petition of the receivers for leave to pay the claim of this respondent be allowed, and the petition for writ of certiorari to review that action should be denied.

Respectfully submitted,

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